UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHARLES W. YOUNG,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-39-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises several issues: whether the evidence of impairment presented by the plaintiff meets or equals the criteria of section 1.03 of Appendix 1 to Subpart P, 20 C.F.R. § 404; whether the commissioner was required to order a consultative examination of the plaintiff; whether the administrative law judge was required to consult a medical advisor at the hearing held on the plaintiff's appeal; whether the administrative law judge erred in assessing the plaintiff's credibility; whether the administrative law judge posed an appropriate hypothetical question to the vocational expert; and whether the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 17, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge was entitled to rely upon the evaluation of the plaintiff's residual functional capacity prepared by a state agency physician reviewer who did not examine him and whose conclusions, the plaintiff contends, are without factual support in the record.[2] I recommend that the court affirm the commissioner's decision.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from residual effects of a fracture of the right ankle, an impairment that was severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 ("the Listings"), Finding 3, Record p. 19; that his statements concerning his impairments and their impact on his ability to work were not entirely credible in light of his own description of his activities and life style, the degree of medical treatment required, discrepancies between his assertions and information included in the record, the reports of the treating and examining practitioners, the medical history, and findings made on examination, Finding 4, Record p. 19; that he lacked the residual functional capacity to lift and carry more than 20 pounds or 10 pounds on a regular basis, Finding 5, Record p. 19; that he was unable to perform his past relevant work as a temporary worker, egg farm worker, and farmhand, Finding 6, Record p. 19; that his capacity for the full range of light work was diminished by his right ankle dysfunction and residual pain, Finding 7, Record p. 19; that given his age (31), education (high school),work experience (unskilled) and exertional capacity (light work),

[2] Almost in passing, the plaintiff contends in his statement of errors that Social Security Ruling 96-6p is unconstitutional. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5) at 16. This argument is undeveloped and, in any event, the court need not reach it under the circumstances set forth in the body of this recommended decision.

application of 20 C.F.R. §§ 404.1529 and 416.969, along with section 202.17 of Appendix 2, Table 2, to Subpart P, 20 C.F.R. § 404 ("the Grid"), would direct a conclusion that he was not disabled, Findings 8-11, Record pp. 19-20; that although he was not capable of performing the full range of light work, he was capable of making the adjustment to work that existed in significant numbers in the national economy, including employment as a motel desk clerk, hand assembler, electronics assembler, or cashier, and that, although the position of electronics assembler would not be available if the plaintiff were moved to the sedentary exertional level, a finding that he was not disabled was therefore reached within the framework of the Grid, Finding 12, Record p. 20; and that he had not been under a disability as defined in the Social Security Act at any time through the date upon which his insured status expired or at any time through the date of the decision, Finding 13, Record p. 20. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final decision of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

I. Discussion

A. The Listing

The claimant carries the burden of proof at Step 3 of the commissioner's evaluative process. 20 C.F.R. §§ 404.1520(d), 416.920(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). The plaintiff contends that the condition of his right ankle meets or equals Listing 1.03(B), entitled "Arthritis of a major weight-bearing joint (due to any cause)." That listing provides:

> With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:
>
> * * *
>
> B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

Section 1.03, Appendix 1, Subpart P, 20 C.F.R. § 404. To meet a listing, a claimant must submit evidence of the specific medical findings — symptoms, signs and laboratory findings — set forth in the listing. 20 C.F.R. §§ 404.1525(d), 416.925(d). To be equivalent to a listing, the evidence submitted by the plaintiff must show medical findings at least equal in severity and duration to the listing findings, which is determined by comparing the symptoms, signs and laboratory findings in the submitted materials with the medical criteria included in the listing. 20 C.F.R. §§ 404.1526(a), 416.926(a). Determinations of equivalence must be based only on medical evidence and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §§ 404.1526(b), 416.926(b).

At the oral hearing, counsel for the plaintiff identified medical records that he contends demonstrate the plaintiff's inability to return to full weight bearing on his right ankle within 12

months following his June 1995 surgery. Record at 199, 203, 222, 232-34, 239. However, the fact that the plaintiff had pain and occasional swelling in the ankle after he returned to unassisted use of that ankle does not necessarily mean that he could not bear full weight on it. Indeed, a treating physician opined that the plaintiff's degree of activity had interfered with the ankle's healing process. *Id*. at 232.

The ankle is defined as a major joint. Listings, Section 1.00(D). It is obviously a weight-bearing joint. *See, e.g., Walden v. Bowen*, 660 F. Supp. 1250, 1252 (N.D.Ill. 1987). The medical records demonstrate a history of persistent right ankle pain, Record at 201 (March 1996), 222 (December 1996), 239 (February 1997), and stiffness, *id*. at 222, 239. There is evidence of marked limitation of motion in the right ankle. *Id*. at 222, 239. The plaintiff assumes that the surgery on his ankle, described by the surgeon who conducted it as "O[pen] R[eduction] I[nternal] F[ixation] of right pilon fracture," *id*. at 198, was reconstructive surgery. However, existing case law casts doubt on this assumption. *See Tyer v. Chater*, 1996 WL 103833 (E.D.Pa. Mar. 11. 1996), at *3; *Fimbres v. Shalala*, 1993 WL 365878 (N.D.Cal. Sept. 1, 1993).

It is not necessary to resolve this issue because the evidence supports a conclusion that the plaintiff's right ankle returned to full weight-bearing status by June 1996. The plaintiff emphasizes that in February 1997 the condition of his right ankle was diagnosed by x-ray as post traumatic arthritis. Record at 241. The treating physician limited the plaintiff at that time to standing or walking for no more than 30 minutes at a time, noting the patient's report of "difficulty bearing weight" on the ankle. *Id*. at 239. However, the regulation does not require anything other than return to full weight-bearing status, which was achieved when the plaintiff returned to work, if not before. The regulation does not require return to full weight-bearing status without lingering pain

or episodic swelling of the joint. Such an interpretation of the regulatory language would stretch too broadly and read far too much into words that are clearly limiting on their face.

Accordingly, the plaintiff failed to meet his burden to establish that his right ankle met Listing 1.03. The administrative law judge did not err in this regard.

B. Other Issues

The claimant argues that the administrative law judge was required to order a consultative examination because the existing medical records "contain no specific examination results regarding residual functional capacity" with respect to his right ankle. Statement of Errors at 5. However, as discussed above, there is sufficient evidence in the record to support a conclusion that the plaintiff's ankle had returned to full weight bearing status within 12 months after his surgery. No consultative examination was necessary. 20 C.F.R. §§ 404.1517, 416.917. In fact, residual functional capacity assessments addressing the plaintiff's ankle were completed by the non-examining state agency physicians. Record at 206-21. For similar reasons, there was no need for the administrative law judge to consult a medical advisor at the hearing. *See also Davis v. Chater*, 104 F.3d 361 (table), 1996 WL 732298 (6th Cir. Dec. 19, 1996), at **2 (administrative law judge has discretion to decide whether to call medical expert); *Siedlecki v. Apfel*, 46 F.Supp.2d 729, 732 (N.D.Ohio 1999) (failure of administrative law judge to call medical expert at hearing not proper basis for remand or reversal inasmuch as matter is within administrative law judge's discretion by regulation). Contrary to the plaintiff's conclusory arguments, the administrative law judge in this case neither rendered a medical judgment nor assessed the plaintiff's residual functional capacity based on a bare medical record.[3]

[3] In addition, contrary to the plaintiff's argument, Statement of Errors at 16-18, the state-agency medical consultant may reach a conclusion concerning the plaintiff's exertional limitations (continued...)

The plaintiff next contends that the administrative law judge's evaluation of his credibility with respect to his "uncontradicted testimony" concerning pain, Statement of Errors at 8, was insufficient under *Avery v. Secretary of Health & Human Servs*., 797 F.2d 19, 21 (1st Cir. 1986).[4] I begin by noting that the administrative law judge did not ignore the plaintiff's testimony concerning pain in his right ankle[5] when posing a hypothetical question to the vocational expert. Record at 45-46. The plaintiff's discussion of this issue is directed at the administrative law judge's assessment of his residual functional capacity at Step 5 of the evaluative process, but he does not specify how that assessment would have changed if full credit had been given to his testimony concerning pain.

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[3](...continued)
in the absence of a specific finding from a treating physician concerning that limitation. Specifically, the plaintiff contends that the agency consultant's finding that he could stand and/or walk for a total of two hours per day, Record at 207, is without support in the medical records because a treating physician gave him "a work note restricting him from prolonged standing or walking, any more than 30 minutes at a time," *id*. at 239. In fact, the two statements are not necessarily inconsistent. *See Robinson v. Apfel*, 172 F.3d 63 (table), 1999 WL 74025 (10th Cir. Feb. 17, 1999), at **3 (ability to walk a mile each day not necessarily inconsistent with ability to walk just ten minutes at a time). The physician consultant was entitled to draw his conclusion concerning total standing and walking time from this and other reports of the plaintiff's treating physicians. The administrative law judge was entitled to rely on this conclusion. 20 C.F.R. §§ 404.1527(f), 416.927(f).

[4] The plaintiff's contention that the administrative law judge was required to "make an[] inquiry, by . . . consultative examination or . . . other means, into the possibility of a mental impairment if she concluded that the testimony reflected pain disproportionate to the objective evidence," Statement of Errors at 11 n.4, is understandably unsupported by citation to authority. Imposing such a requirement on the commissioner would result in expansion of many, even perhaps a majority of, administrative law judge hearings and applications for benefits in general, without a discernable concomitant benefit. At oral argument, counsel for the plaintiff contended that such an inquiry was necessary in this case because there was insufficient evidence to allow the administrative law judge to evaluate the plaintiff's credibility thoroughly and because the objective factual findings support the plaintiff's testimony. As set forth in the following text, I find neither argument to be a correct evaluation of the record in this case.

[5] The Statement of Errors refers to pain in both the right ankle and the left wrist in connection with this issue, *id*. at 13, but the plaintiff's own testimony concerning the wrist was "If I can pick something up real, extremely heavy, it hurts. You know, but nothing, nothing major," Record at 42.

The administrative law judge found that the plaintiff had a capacity for "the full range of light work . . . diminished by his right ankle dysfunction and residual pain." Record at 19. The plaintiff mentions only alleged failures to "discuss" the effect of the pain as diminishing his concentration, limitations on standing (presumably due to the pain), and the effect of his fused wrist on bilateral manual dexterity. Statement of Errors at 13.

As previously discussed, there is no medical evidence to suggest that the plaintiff has limited bilateral manual dexterity, and his own testimony established only that the left wrist caused him pain when he picked up something "extremely heavy," an event not within the weight limits of light work. 20 C.F.R. §§ 404.1567(b); 416.967(b). The medical evidence cited by the plaintiff, limiting him to standing no more than 30 minutes at a time, Record at 239, does not support his testimony that he cannot walk on the ankle at all, *id.* at 31. The administrative law judge does discuss this testimony, *id*. at 16, and, while not explicitly referring to the pain in her findings at Step 5, does list available jobs that do not require extensive walking and provide a sit/stand option, as she discussed with the vocational expert, *id*. at 45-47. As evidence of an effect of the pain on the plaintiff's ability to concentrate, the plaintiff cites page 193 of the record, which is his own report to the commissioner that "it hurts" to concentrate. There is no medical evidence to support this statement and accordingly there was no need for the administrative law judge to consider it. 20 C.F.R. §§ 404.1529(b); 416.929(b). In summary, the plaintiff has not shown any failure by the administrative law judge adequately to consider his testimony concerning pain with regard to his residual functional capacity that could have had any adverse effect on that determination. There is accordingly no need to address the specific means of evaluating claims of pain set forth in *Avery*.

The final issue raised by the plaintiff concerns the failure of the administrative law judge to

include two alleged limitations in her questions to the vocational expert: the fusion of the plaintiff's left wrist[6] and his inability to bend at the waist. Statement of Errors at 15. The former omission is troublesome in light of the vocational expert's identification of jobs available for the plaintiff as motel desk clerk, hand assembler, electronics assembler and cashier. Most of those jobs would require manual dexterity, which might be incompatible with a fused wrist, *see Trujillo v. Richardson*, 429 F.2d 1149, 1151 (10th Cir. 1970) (claimant with fused left wrist, who "retains full use of the left arm and hand," should avoid work that requires "heavy or complicated manual ability"); *Coughlin v. Secretary of Health & Human Servs.*, 671 F. Supp. 138, 142 (E.D.N.Y. 1987) (left wrist fusion raises "substantial question as to whether plaintiff has full use of his left hand" and requires administrative law judge to make finding about plaintiff's full bilateral manual dexterity). However, the plaintiff himself testified that there was "nothing major" when asked if there was anything wrong with his ability to handle or grip objects, Record at 42, and his treating physician reported in July 1995 that he had reached "a medical endpoint[] regarding his wrist fusion" and went on to observe: "I believe that he does have a work capacity referable to his wrist," *id*. at 197. There is no other evidence in the record to support any suggestion of a limitation due to the left wrist fusion and accordingly the administrative law judge's omission of the fusion from the hypothetical question to the vocational expert was not error. The commissioner is required to consider the limiting effects of impairments that are not severe in determining residual functional capacity, 20 C.F.R. §§ 404.1545(e), 416.945(e), and the administrative law judge's hypothetical question to a vocational expert must mention significant functional limitations, *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir.

[6] The Statement of Errors refers to "a fused wrist in his dominant right hand." *Id*. at 15. The plaintiff testified that he was right-handed, Record at 42, but the fused wrist is clearly that of the left hand, *id*. at 180-81, 242.

1994), but in both of these situations there must be some underlying medical evidence to support the claimed limitation, *see, e.g., Plummer v. Apfel*, 186 F.3d 422, 431 (3d Cir. 1999) (hypothetical must include "every credible limitation established by the physical evidence"). Such evidence concerning the plaintiff's left wrist is not part of the record in this case.

The second issue concerning the hypothetical question is easily resolved. There is no medical evidence in the record to support the plaintiff's claim that an inability to bend from the waist, Statement of Errors at 15, should have been included in the hypothetical questions posed to the vocational expert. The plaintiff's counsel, when asked about this at oral argument, could cite nothing other than the plaintiff's own testimony. That is insufficient.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of December, 1999.

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David M. Cohen
United States Magistrate Judge